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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL VAUGHN NICKERSON, Defendant and Appellant.	G040049 (Super. Ct. No. FBA006680) O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County, Thomas D. Glasser, Judge. Affirmed as modified.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Steve Oetting and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

While driving under the influence of alcohol and drugs, appellant Michael Vaughn Nickerson caused a fatal traffic accident near Barstow. Following his conviction for manslaughter and other crimes, the court sentenced him to 25 years to life, plus 5 years based on his prior record. On appeal, he contends his convictions should be reversed because the police did not respect his *Miranda* rights (see *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*)) and the court committed evidentiary and instructional error. He also contends the court erred in failing to dismiss one of his prior strike convictions and by denying him conduct credits toward the indeterminate portion of his sentence. We agree with appellant's last contention, and therefore we will modify the judgment with respect to his conduct credits. Other than that, however, we will affirm the judgment in its entirety.

FACTS

Johnny Kearny was driving south on Interstate 15 one evening when a gray or silver car rocketed past him at a very high rate of speed. A few seconds later, he came upon a cloud of dust and pulled over on the freeway near Mannix Wash. Seeing headlights, he went down in the wash and discovered an overturned red Honda with Jason Clark trapped inside. Clark was badly injured and died on the scene.

Highway Patrolmen Michael Ware and Greg Cameron were among the first officers on the scene. They noticed two sets of tire marks leading to the crash site and gray paint on a nearby guardrail. They also found gray paint on the rear bumper of Clark's car, as well as a license plate and taillight fragments that did not belong to Clark's car.

As the officers were contemplating this collection of facts, appellant called the police from a market located about four miles from the crash site. He reported his car was on fire, and a fire crew was dispatched to assist him. The crew arrived at the market to find the engine compartment of appellant's car fully engulfed in flames. After the fire was contained, Fire Lieutenant Adam Lux approached

appellant and asked him what happened. Appellant said he had hit another car just up the road, near the I-15 off ramp. Lux noticed there was both front and rear-end damage to appellant's car, which was a "green over gray Lexus."

Lux radioed in his findings, and Officer Ware was dispatched to the market. When he arrived, the fire crew departed, and he spoke with appellant in the parking lot. Appellant said he had been involved in an accident, and at that point, Ware told him that another officer would be coming out to talk to him about that. He told appellant to wait at the market until the officer arrived, and appellant complied. A short time later, Officer Cameron and his partner arrived at the market, and Ware returned to the crash site.

Cameron asked appellant if he had been involved in a traffic collision, and he said yes. He said he was traveling on the freeway at normal speeds when the driver of the car in front of him, a brown Toyota Camry, suddenly slammed on his brakes. Appellant said he rammed into the rear of the Camry and lost control of his car, which erupted into flames. However, he managed to make it to the market, and from there he called the police.

As appellant was explaining this to Cameron, Cameron noticed the odor of an alcoholic beverage on his breath. Appellant admitted drinking, and Cameron then subjected him to a series of sobriety tests, after which he arrested him for being under the influence. Then he searched appellant's luggage and found brass knuckles and a pipe with marijuana residue on it.[1]

Later, Cameron noticed there was a trail of fluid leading from the crash site to the market. He also determined that one of the taillight fragments from the crash site matched a broken taillight on appellant's car. And the license plate found at the crash site matched the license plate on appellant's car. Based on all these facts,

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[1] Subsequent testing revealed that appellant's blood-alcohol level was .13 percent and that he also had marijuana in his system.

both Cameron and Ware were of the opinion appellant had run into Clark's car, causing him to lose control of his vehicle and crash. They arrested him.

While appellant was in jail awaiting trial, he had a telephone conversation with his girlfriend. He told her he was going to tell his attorney someone else was driving his car at the time of the accident. When his girlfriend questioned this tactic, appellant insisted the police would have to let him go if somebody was willing to say that they were driving his car when the accident occurred.

Appellant did not employ this strategy at trial. Testifying on his own behalf, he told the jury essentially the same story he told Officer Cameron about the brown Camry suddenly braking in front of him. During his testimony, he also admitted he had previously been convicted of numerous crimes, including robbery, theft and "DUI hit and run."

In closing argument, defense counsel insisted appellant was not involved in the collision with Clark, but a separate accident involving a brown Camry (Clark's car, after all, was a red Honda). Nonetheless, the jury convicted appellant of gross vehicular manslaughter while intoxicated, causing injury while driving under the influence, leaving the scene of an accident and possessing a deadly weapon. The jury also found appellant had suffered two prior strike convictions and served five prior prison terms.

After denying appellant's request to dismiss one or more of his strike convictions, the court sentenced him to 25 years to life on the manslaughter count, plus 5 years for the prison priors. The court stayed or imposed concurrent sentences on the remaining counts and enhancements. It granted appellant 982 days of presentence conduct credit, but limited that award to the determinate portion of his sentence. The court ruled, "There are no conduct credits for the indeterminate sentence."

I

Appellant contends the trial court should have suppressed his statements to Officer Cameron because Cameron did not advise him of his *Miranda* rights before speaking with him. (See *Miranda, supra,* 384 U.S. 436.) But appellant was not in custody for *Miranda* purposes at the time Cameron interviewed him. Therefore, his statements to the officer were properly admitted into evidence.

As explained above, appellant told Fire Lieutenant Lux he had hit another car. He also told Officer Ware he had been involved in an accident. At that point, Ware told appellant to stay put until another officer, Cameron, could come out and talk to him. While waiting for Cameron to arrive, Ware watched appellant from time to time, but he was free to walk around on his own. He was not restrained in any manner. When Cameron arrived, Ware left and Cameron contacted appellant in the parking lot, while his partner looked on. Cameron did not restrict appellant's movement, place him under arrest or tell him he had to stay. He merely asked appellant some questions about his car and how the accident occurred, and appellant proceeded to tell him the story about the brown Camry braking in front of him. At that time, Cameron did not challenge appellant's story or accuse him of doing anything wrong.

At the *Miranda* hearing, Cameron testified he did not in fact believe appellant's story and instead suspected he had been involved with the Clark car. For that reason, he was not about to let appellant leave the scene, and if appellant had tried to do so, he would have stopped him. However, appellant never tried to go anywhere. Because he cooperated with the investigation, there was no need to restrain him in any fashion during the questioning. It wasn't until appellant admitted he had been drinking and failed the sobriety tests that Cameron arrested him and took him into custody.

The trial court found that prior to his arrest, appellant was not in custody for *Miranda* purposes, and we agree. "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495.) Whether a suspect is in custody is resolved by asking whether the circumstances "created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest." (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.)

Factors bearing on the custody issue include 1) whether the suspect was formally arrested before questioning; 2) the length of his detention; 3) where it occurred; 4) the ratio of officers to suspects; and 5) the demeanor of the officers. (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.) "Additional factors are whether the suspect agreed to the interview and was informed he or she could terminate the questioning, whether police informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement during the interview, and whether police officers dominated and controlled the interrogation or were 'aggressive, confrontational, and/or accusatory,' whether they pressured the suspect, and whether the suspect was arrested at the conclusion of the interview. [Citation.]" (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403-1404.)

The record in this case shows that appellant was subjected to brief questioning by Lux and Ware, but they never placed him under arrest or physically restrained him. Ware did tell appellant to wait at the market until Cameron arrived. But when Cameron got there, Ware left and Cameron took no measures to restrict appellant's movement. He simply asked appellant a few questions about the accident, and appellant proceeded to answer him without pause. Besides, appellant's car was disabled; his options were staying at the market or wandering off into the desert.

Although Cameron's partner was present, he was just a passive observer; he did not actively participate in the questioning, which took place in the parking lot of a public market. There is no evidence Cameron conducted the interview in anything other than a professional, courteous manner, and at no time did he tell appellant he was a suspect in Clark's death. Rather than challenging appellant's story or pressuring him into make an incriminating statement, Cameron just listened to what he had to say. So, the interview took on the tone of an investigative, as opposed to an accusatory, exchange. These circumstances support the conclusion appellant was not in custody for *Miranda* purposes during the interview.

Granted, Cameron never told appellant he could terminate the questioning. And in Cameron's mind, appellant was not in fact free to leave. However, "[t]he test for custody does not depend on the subjective view of the interrogating officer[.]" (*People v. Mosley* (1999) 73 Cal.App.4th 1081, 1088.) Because appellant never actually tried to leave the scene, there was no need for Cameron to restrict his movement. Cameron's subjective intentions were therefore irrelevant. (*People v. Peevy* (1998) 17 Cal.4th 1184, 1199.)

Moreover, even if appellant had been told that he was not free to leave during the interview, that would not compel the conclusion he was in custody for *Miranda* purposes. Whether a suspect is free to leave during a police encounter is of central importance in deciding whether he has been seized under the Fourth Amendment. (See *People v. Brendlin* (2006) 38 Cal.4th 1107, 1115.) However, "[w]hether an individual has been . . . seized for Fourth Amendment purposes and whether that individual is in custody for *Miranda* purposes are two different issues. [Citation.]" (*People v. Pilster, supra,* 138 Cal.App.4th at p. 1405; see also *People v. Brendlin, supra,* 38 Cal.4th at p. 1117.) Indeed, it is entirely possible for a suspect to be seized for Fourth Amendment purposes, on the one hand, while remaining free of

custody for *Miranda* purposes, on the other. (See, e.g., *United States v. Swanson* (6th Cir. 2003) 341 F.3d 524, 529.) *Miranda*, as we've noted, does not require suppression of a suspect's statements unless his detention was so restrictive as to be tantamount to a formal arrest.

For the reasons explained above, we do not believe appellant's contact with the police rose to that level. Rather, it appears to us that appellant was merely subjected to general, on-the-scene questioning. And the law is clear that *Miranda* warnings are not required under these circumstances. (See *Miranda v. Arizona, supra,* 384 U.S. at p. 477.) Therefore, *Miranda* was not implicated in this case, and appellant's statements were properly admitted into evidence.

Even were we to find otherwise, we are convinced any error that may have occurred by virtue of admitting appellant's statements to Cameron was entirely harmless. Appellant argues to the contrary, noting that he "incriminated himself by revealing to Officer Cameron that he had been involved in a traffic accident." However, prior to speaking with Cameron, appellant told Lux and Ware the very same thing. Because his statements to Cameron were largely cumulative, any error in admitting them was harmless beyond a reasonable doubt. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 310; *Parsad v. Greiner* (2d Cir. 2003) 337 F.3d 175, 185-186; *Tankleff v. Senkowski* (2d Cir. 1998) 135 F.3d 235, 245-246.)

II

Appellant also contends it was improper for the trial court to allow Cameron and Ware to state their opinions about how the collision occurred. He contends the officers were not qualified to opine on this subject, but we discern no abuse of discretion in allowing the officers' opinions into evidence.

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).)

"'The trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion [is] shown. [Citations.]' [Citation.] This court may find error only if the witness '*clearly lacks* qualification as an expert.' [Citation.]" (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1377 [upholding the admission of officers' opinions that the accidents in question were purposely staged to perpetuate insurance fraud].)

Officer Ware testified he has been a patrol officer for five years and has received training on how to investigate traffic accidents. Based on his investigation in this case, he knew there were two sets of tire marks leading to the crash site. He also knew the license plate found at the accident scene matched the one from appellant's car and that the gray paint found on the guardrail and the rear bumper of Clark's car was consistent with the paint on appellant's car. Based on "the totality of the physical evidence," he opined the crash involved two vehicles — appellant's and Clark's.

Appellant contends Ware was not qualified to render this opinion because he was not shown to be an expert in the area of accident reconstruction. However, police officers whose duties include the investigation of automobile accidents are generally qualified as experts and may properly testify about various matters related to an accident. (See *People v. Haeussler* (1953) 41 Cal.2d 252, 260 [point of impact between vehicles]; *Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1616 [causation]; *Hart v. Wielt* (1970) 4 Cal.App.3d 224, 229 [reasonable rate of speed for the conditions].)

Although Ware was not shown to be an expert in the field of accident reconstruction, he did have training and experience in accident investigation. And his opinion that there were two vehicles involved in the accident was based upon what he saw and learned at the accident site. Therefore, he was qualified to render an opinion about whether appellant's car was involved in the collision, and the trial court did not abuse its discretion in allowing him to offer his opinion in this regard.

Officer Cameron, as the lead investigator in the case, was more involved in the investigation than Ware. Not only did he observe the tire track, paint transfer and license plate evidence mentioned above, he also collected taillight fragments at the scene of the accident and discovered that they matched the broken taillight of appellant's car. And he discovered a trail of fluid leading from the accident site to the market where appellant's car was located. In rendering his opinion about the case, Cameron discussed all these factors. He also relied on the damage to appellant's car, which he described as "crush damage," and appellant's admission about being in an accident.

Based on all this evidence, Cameron was of the opinion that appellant hit the rear of Clark's car, causing Clark to veer into the median and crash in the wash. He also theorized that following the initial impact, appellant's car veered wildly, losing its license plate and banging into the guardrail in the process. When it was pointed out to him that the gray paint marks on the guardrail were higher than the level of appellant's bumper, Cameron explained that if a forward moving vehicle hits something or suddenly reduces speed, its weight will transfer to the front, causing the rear of the vehicle to rise.

Appellant questions Cameron's qualifications to testify about such matters as weight transfers and crush damage, but at the time of the trial, Cameron had been a patrol officer four years, investigated thousands of traffic accidents and was familiar with the markings and evidence that are produced by automobile collisions. Given this experience, the trial court could reasonably conclude Cameron was qualified to render an opinion as to how the accident occurred. To the extent his opinions may have stretched the limits of his expertise, it was defense counsel's job to point this out on cross-examination, which he ably did. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1229.) We do not believe the court abused its discretion in allowing Cameron's opinions into evidence in the first instance.

In any event, there was overwhelming evidence, apart from the officers' opinions, that appellant was responsible for Clark's death. Everything from the physical evidence at the scene to appellant's own statements implicated him in the matter, and we do not believe the officers' opinions, although relevant, really added that much to the case. Indeed, we can safely say it is not reasonably probable appellant would have achieved a more favorable verdict in the absence of the challenged testimony. Therefore, any evidentiary error that occurred was surely harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

III

Appellant contends the court prejudicially erred in instructing the jury on the crime of gross vehicular manslaughter while intoxicated. Particularly, he claims the court failed to convey the notion that gross negligence is an essential requirement of the crime. The claim is not well taken.[2]

The court told the jury that in order to convict appellant of gross vehicular manslaughter while intoxicated, it must find, inter alia, he committed "with gross negligence" an unlawful act that was dangerous to human life or a lawful act that might cause death. The court also defined gross negligence and cautioned the jury that driving under the influence, in and of itself, does not constitute gross negligence.

Because gross vehicular manslaughter while intoxicated can be predicated on either an unlawful act or a lawful one, the court also gave a unanimity instruction, which read in part: [T]he prosecution has introduced evidence for the purpose of showing that there is more than one act upon which a conviction may be based, specifically an unlawful act of violating . . . the basic speed law, and an

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[2] Although appellant did not raise this claim in the trial court, we will nonetheless consider it because he alleges the alleged error infringed his "substantial rights" (see Pen. Code, § 1259) and he raises the specter of ineffective assistance of counsel. In the interest of judicial economy, we examine the issue now, rather than later.

ordinarily lawful act [of] driving a motor vehicle . . . . Defendant may be found guilty if the proof shows beyond a reasonable doubt that he committed either one or both of the acts. However, in order to return a verdict of guilty, all jurors must agree that he committed the same act or acts."

Because the unanimity instruction did not reiterate that gross negligence is a requirement of gross vehicular manslaughter while intoxicated, appellant contends this requirement was not adequately conveyed to the jury. In assessing this claim, we must look at the instructions as a whole, not in artificial isolation. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) We also must assume that the jurors are reasonably intelligent human beings capable of understanding and correlating all the instructions they were given. (*Ibid*.) And, if the instructions are reasonably susceptible to such an interpretation, we should strive to harmonize them and interpret them so as to support the judgment rather than defeat it. (*People v. Fauber* (1992) 2 Cal.4th 792, 863; *People v. Moore* (1996) 44 Cal.App.4th 1323, 1330-1331; *People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.)

Although the court did not mention the concept of gross negligence in giving the unanimity instruction, there was no need for it to do so. It had already instructed the jury that gross negligence is an essential element of gross vehicular manslaughter while intoxicated. The court had also provided the jurors with a legal definition of gross negligence and informed them that driving under the influence does not, by itself, constitute gross negligence. These were the core instructions on gross negligence, whereas the unanimity instruction focused on another requirement altogether, namely the need for the jury to unanimously agree as to which act formed the basis for appellant's conviction.

Considering the unanimity instruction was not intended to impart the law on gross negligence, and the jury was fully informed of that law under other properly given instructions, we must reject appellant's claim of instructional error.

Viewing the instructions as a whole, it is not reasonably likely that in deliberating on the charge of gross vehicular manslaughter while intoxicated, the jury dispensed with the requirement of gross negligence.

IV

Appellant contends the court abused its discretion in refusing to strike one or more of his prior strike convictions. However, in light of all the pertinent circumstances, the court's decision was entirely justified. No abuse of discretion has been shown.

Trial courts are empowered to dismiss a prior strike conviction if doing so would further the ends of justice. (Pen. Code, § 1385, subd. (a); *People v. Superior Court (Romero)* 13 Cal.4th 497, 507-508.) In deciding whether to exercise this power, a court must consider the constitutional rights of the defendant and the societal interest in ensuring the fair prosecution of criminal cases. (*People v. Superior Court (Romero), supra*, 13 Cal.4th at p. 530.) Ultimately, the court must determine "whether, in light of the nature and circumstances of his present felonies and prior [strikes], and the particulars of his background, character, and prospects, the defendant may be deemed outside the [spirit of the Three Strikes law], in whole or in part, and hence should be treated as though he had not previously been convicted of one or more [strikes]." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The trial court's failure to strike a prior conviction allegation is reviewed for an abuse of discretion – a most deferential standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) In fact, only in "an extraordinary case — where the relevant factors described [above] manifestly support the striking of a prior conviction and no reasonable minds could differ" would the failure to strike constitute an abuse of discretion. (*Id*. at p. 378.) This is not such a case.

In denying appellant's request to strike one or more of his prior convictions, the trial court acknowledged that at the time of the accident, appellant

had a supportive family and was gainfully employed. However, the court found it troubling that appellant drove in a grossly negligent manner after ingesting both alcohol and marijuana, and that following impact, he left the victim to die in a ditch. The court was also concerned that appellant is a "long-time recidivist" who has suffered convictions for theft, robbery, assault, driving under the influence and hit and run. The court noted appellant's robberies occurred over a period of many years and were not the result of a single period of aberrant behavior. It believed there was a "very strong likelihood" appellant would reoffend, and therefore society would be better off if he were incarcerated. While acknowledging appellant was subject to a "harsh penalty" under the Three Strikes law, the court determined he fell within the spirit of that law and did not deserve to have any of his strikes dismissed.

We agree. It is clear that despite numerous prior convictions and imprisonments, appellant has been unable to reform his behavior. And because of that, his list of victims now includes an innocent driver in the form of the deceased, Jason Clark. Considering appellant's history of serious criminal activity, his exceedingly negligent and selfish behavior in the present case, and his overall prospects, it appears to us he is precisely the type of offender who warrants an extended prison commitment under the Three Strikes law. Therefore, we cannot say the court abused its discretion in denying his motion to strike.[3]

V

At sentencing, the court awarded appellant 982 days of presentence conduct credit, which is precisely the amount he claims he is entitled to. The Attorney General also agrees with this number. However, the court restricted that award to the determinate portion of appellant's sentence. It ruled, "There are no

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[3] In conclusory fashion, appellant also contends his sentence violates due process and the prohibition against cruel and unusual punishment. Because this contention is not accompanied by any supporting argument, we will not consider it. (*People v. Griffin* (2004) 33 Cal.4th 536, 589, fn. 25.)

conduct credits for the indeterminate sentence," i.e., the base term of 25 years to life. We agree with appellant that this limitation is improper.

The court based its decision on *In re Cervera* (2001) 24 Cal.4th 1073, but *Cervera* involved *postsentence* conduct credits, i.e., those credits which are available to inmates while they are serving time in prison. Unlike postsentence conduct credits, presentence conduct credits *are* available to defendants who are sentenced to an indeterminate term of imprisonment under the Three Strikes law. (See *People v. Thomas* (1999) 21 Cal.4th 1122, 1125-1126; *People v. Philpot* (2004) 122 Cal.App.4th 893, 908.) Therefore, we will strike the court's limitation on appellant's presentence conduct credits.[4]

DISPOSITION

The trial court's order limiting appellant's presentence conduct credits to the determinate portion of his sentence is stricken. In all other respects, the judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.

4 Since that limitation does not appear in the abstract of judgment or the minute order of the sentencing hearing, there is no need to modify those documents.